IN THE

Supreme Court of the United States

October Term, 1973

DEC 8 1973
MICHAEL RODAK, JR., CLERK

No. 73-714

ETHEL IMEL, SHIRLEY SHAW, AND NETTIE AMATO,
Petitioners,

v.

ZOHN MANUFACTURING COMPANY, FORMERLY KNOWN AS GROSS WHOLESALE TAILORS, INC., A COLORADO CORPORATION; LOCAL 263, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, A LABOR ORGANIZATION; MIDWEST REGIONAL JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, A LABOR ORGANIZATION; AND AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, A LABOR ORGANIZATION,
Respondents.

BRIEF IN OPPOSITION ON BEHALF OF LOCAL 263; MIDWEST REGIONAL JOINT BOARD; AND AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO

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QUESTION PRESENTED

In these Respondents' view, a more accurate statement of the real question presented by the Petition filed herein than that set forth in that Petition would be framed as follows:

Where a member of a local labor union charges that local union with inadequate representation, but concedes that

neither the national union with which the local is affiliated, nor any of its officials, were involved in the events giving rise to his claim, must the member submit the matter for review to the national union, as required by the national constitution which governs the local and all members, before instituting suit under the provisions of § 301 of the Labor-Management Relations Act (129 U.S.C. § 185) against either union?

COUNTER-STATEMENT OF THE CASE

In the "Statement of the Case" contained within the Petition (pp. 3-5 thereof), there is a failure to distinguish between the basis for the claim asserted against the Amalgamated Clothing Workers of America, AFL-CIO (herein "Amalgamated"), and the basis for the claims asserted against the other two labor organizations, i.e., Midwest Regional Joint Board (herein "Joint Board") and Local 263. Since the claim of Petitioners against Amalgamated, on the one hand, and their claims against the Joint Board and Local 263, on the other, were fundamentally different, and since this difference played a large role in the decision of the Court of Appeals, these Respondents are of the view that a proper disposition of this cause requires that that distinction be recognized. Petitioners' "Statement of the Case" having failed to do so, these Respondents supplement their statement thereof in the following particulars:

Amalgamated is a national labor organization with which numerous local unions are affiliated. In addition, there are intermediate organizations, known as "joint boards," with which each local union is affiliated. Both Local 263 and the Joint Board are affiliates of Amalgamated.

All such affiliates, and their members, are governed both by Amalgamated's Constitution and the constitutions and by-laws of the pertinent local union and joint board.

As noted by the Court of Appeals in its opinion (pp.

A4-A5, Appendix A to Petition), Amalgamated's Constitution provides a procedure for a member of any local union to have the "action or failure to act" of such organization reviewed by the General Executive Board of Amalgamated, itself. Indeed, Amalgamated's Constitution contains specific, express provisions requiring any member who feels he is aggrieved by any such action or inaction to exhaust such procedures before instituting any legal action against either Amalgamated or any of its affiliates.

The Joint Board and Local 263 entered into a collective bargaining agreement with Zohn Manufacturing Company (herein "Zohn"), the terms of which governed the wages, hours of work and other working conditions of certain employees of Zohn in Denver, Colorado, represented by Local 263. This agreement contained provisions providing for the arbitration of grievances and disputes arising thereunder.[1]

Petitioners, who were employees in the unit covered by this contract and members of Local 263, presented two grievances to Local 263 and the Joint Board, alleging, in essence, that Zohn had violated the provisions of this agreement by paying them less than the wage rate called for by that contract and by misinterpreting certain provisions thereof relating to job classifications.

Local 263 and the Joint Board elected to arbitrate the matter of job classifications, but declined to submit to arbitration the issue of underpayment of wages.[2]

As a result, Petitioners filed a complaint against Zohn, Local 263, the Joint Board and Amalgamated in the United

[1] It is conceded that Amalgamated was not a party to this agreement. Indeed, there is no allegation that either Amalgamated or its authorized representatives had any hand in its negotiation.

[2] The judgment in the trial court was entered pursuant to motions for summary judgment filed by these Respondents, which were not based upon the substance of the allegations of the Petitioners' Complaint. There is no evidence within the record, therefore, which discloses the reasons for the refusal of Local 263 and the Joint Board to submit this wage dispute to arbitration.

States District Court for the District of Colorado, relying upon § 301 of the Labor Management Relations Act (Tit. 29 U.S.C. § 185). The material allegations of this complaint were as follows:

a. Zohn breached the provisions of the pertinent bargaining agreement by failing to pay to Petitioners the wages required to be paid to them by the terms of that agreement;

b. Local 263 and the Joint Board arbitrarily and capriciously refused to submit their grievances to abritration; and

c. Amalgamated is legally responsible for the actions of Local 263 and the Joint Board by reason of the doctrine of respondent superior.

All three of these Respondents filed motions for summary judgment, supported by affidavits. Each of them alleged that Petitioners could not maintain the action against it because they had failed to exhaust the internal appeal procedures established by Amalgamated's Constitution. In addition, Amalgamated asserted that none of its authorized agents had any hand in any of the events alleged in the Complaint and, as a consequence, it could not be derivatively liable for the actions of Local 263 or of the Joint Board.[3]

The district court granted judgment to these Respondents on their motions for summary judgment, based solely upon Petitioners' failure to exhaust the remedies provided to them under Amalgamated's Constitution, and the Court of Appeals affirmed that portion of the district court's judgment. Neither court reached the substantive issue of the derivative

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[3] As noted in the opinion of the Court of Appeals (p. A5 of Appendix A of the Petition), Petitioners conceded, in the district court, that: "It is true we do not suggest that any employee or officer of Amalgamated as such had anything to do with the events which led to the filing of this Complaint". Although Petitioners filed counter-affidavits in response to these Respondents' motions, nowhere in any of the documents filed with the district court, did Petitioners assert, or provide any factual basis for the conclusion, that an appeal by them to Amalgamated would be futile.

liability of Amalgamated for the actions of Local 263 and of the Joint Board.

SUMMARY OF THE ARGUMENT

The substantive law to be applied in an action brought pursuant to the provisions of § 301 of the Labor-Management Relations Act must be formulated by the federal and state judiciaries based upon the tenets of the national labor policy, as that policy has been enunciated in the various federal enactments, or to be found within their "penumbra."

One of the most basic of these principles is that the judiciary should not interfere with internal affairs of a labor organization until the organization has had an opportunity to resolve any dispute concerning such matters, itself.

There are, to be sure, exceptional circumstances justifying judicial interference prior to the time that a local union member has exhausted the internal remedies granted to him. Thus, the requirement for exhaustion of internal remedies cannot be applied in such a way so as to restrict a member's rights under § 7 of the National Labor Relations Act (Tit. 29 U.S.C. § 157), or to restrict his freedom to utilize the services of the National Labor Relations Board to enforce such rights. Likewise, where it clearly appears that an appeal by the member to the internal tribunal would be utterly futile, because of the prejudice or bias of that tribunal, the member will not be required to perform a useless act.

In the absence of such exceptional circumstances, however, a union member will not be excused from performing those obligations contained within his organization's governing documents which the member assumed when he accepted membership in the organization.

The case presented by Petitioners here disclosed no such exceptional circumstances, either by pleading or by proof. The Court of Appeals for the Tenth Circuit, consistent with other federal and state decisions upon the issue, correctly

determined that Amalgamated and its affiliates should be given an opportunity to resolve Petitioners' complaints internally prior to judicial interposition.

ARGUMENT

Section 301 of the Labor-Management Relations Act (Tit. 29 U.S.C. § 185) intends that the judiciary must formulate a federal common law, to be applied by both federal and state courts, and that this federal common law be based upon the national labor policy as disclosed in national legislation. *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 77 S.Ct. 912 (1957). Under this statutory provision, an employee whose employment is subject to the provisions of a collective bargaining agreement may not institute suit against his employer for breach of that agreement, unless he can establish that he has attempted to make use of any contractual grievance procedures set forth in that agreement, but has been thwarted in his attempt by the arbitrary, capricious or invidiously discriminatory actions of his union. *Republic Steel Corporation v. Maddox,* 379 U.S. 650, 85 S.Ct. 614 (1965) and *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903 (1967). If, however, the employee's evidence establishes both a breach of contract by the employer and arbitrary action by his bargaining agent, he is entitled to proceed in an action against both to obtain relief against both. *Vaca v. Sipes,* supra.

Nothing within these precepts, however, relieves the member from his obligation to pursue the internal procedures and remedies provided for within his union's constitution, in the absence of a showing of some exceptional circumstance justifying his failure to utilize these procedures. And, we submit, the mere naked allegation that a *subordinate* body has treated the member arbitrarily cannot justify a failure to submit his complaint to the *national* organiza-

tion, particularly where, as here, the member concedes that the national organization has had nothing to do with the events leading to his complaint.

Indeed, both prior, and subsequent, to this Court's decision in *Vaca*, supra, the various courts of appeal which have had occasion to pass upon the matter have been substantially uniform in holding that, as a general rule, a claim of a member based upon an allegation of inadequate representation by his local union, must, where required by the pertinent constitution, be submitted to the national organization for review before the institution of legal action. *Brady v. Trans World Airlines*, 401 F.2d (3rd Cir., 1968), cert. den. 393 U.S. 1048 (1969); *Bsharah v. Eltra Corporation*, 394 F.2d 502 (6th Cir., 1968); *Fingar v. Seaboard Air Line Railroad Company*, 277 F.2d 698 (5th Cir., 1960); and *Gainey v. Brotherhood of Railway and Steamship Clerks*, 275 F.2d 342 (3rd Cir., 1960).

In *Fingar v. Seaboard Air Line Railroad Company*, supra, for example, the Fifth Circuit noted that, where the constitutional remedies provide for an appeal to the *national* organization, failure to institute such an appeal is not excused by an allegation that *local* officials are hostile to the member. *Brady*, supra, reaches a like conclusion.

There can be no question, then, but what there has been general recognition given to the principle that a necessary condition precedent to a member's action against his union is the exhaustion by him of any internal appeal procedures provided for in the organization's constitution.[4]

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[4] In their petition, Petitioners complain that a like rule is not applied to employees in the bargaining unit who are *not* union members. This is obviously true — but neither do non-members obtain the benefits of union membership. Petitioners, having chosen to receive such benefits, are, likewise, subject to the obligations attendant upon their membership in the union.

Of course, there are exceptions to this principle. One such exception finds its genesis in the necessity of requiring a member's constitutional obligation to his union to yield to the paramount public concern in the exercise by him of his Section 7 rights. The articulation of this exception to the general principle is to be found in this Court's opinion in *N.L.R.B. v. Shipbuilding Workers, Local 22*, 391 U.S. 418, 88 S.Ct. 1562 (1968).

In that case, an internal union tribunal penalized a member because he filed charges against the union with the National Labor Relations Board without first exhausting his internal appeal procedures, as required by the constitution. Recognizing the paramount public interest in encouraging free access to the Labor Board by employees, this Court concluded that restrictions upon this free access, except in a case involving a "plainly internal affair," is contrary to public policy.

The case at bar, however, does not involve any public interest with which the National Labor Relations Board has been entrusted; the only rights which Petitioners here seek to enforce are those arising out of a collective bargaining agreement. Petitioners' case obviously does not fall within the ambit of the *Shipbuilding Workers* case.

Another exception to the general rule requiring exhaustion is where the member can demonstrate that, due to the bias, prejudice or hostility of the members of the tribunal to which he must submit his grievance, requiring him to utilize such procedures would be an act of futility, and is exemplified by the decision in *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 89 S.Ct. 548 (1969). There, the claim was made that the employer had violated the provisions of a bargaining agreement by the assignment of white apprentices, rather than black carmen, to do certain work;

that complaints had been made to representatives of the Brotherhood of Railway Carmen, which was the employees' bargaining agent, about the matter; that the Brotherhood had, nevertheless, condoned the employer's actions; and that the members instituting suit had been advised by the Brotherhood's representatives, on numerous occasions, that the members involved would never "get white men's jobs," that "nothing would ever be done for them," and that "to file a formal complaint with the Brotherhood or with the Company would be a waste of their time."

Based upon these allegations, together with others, the *Glover* court concluded that the plaintiffs there had demonstrated that an attempt by them to exhaust either the grievance procedures of the contract, or the internal procedures of the Brotherhood's constitution, would be futile. Their suit against both the employer and the Brotherhood was allowed to proceed without requiring them to attempt to utilize these procedures.

The issue of any consequence presented to the lower courts, then, was whether Petitioners' pleadings and affidavits made out a case controlled by *Glover*, or whether it fell within the parameters of the general rule requiring exhaustion.

The Tenth Circuit's decision that Petitioners did not present a *Glover*-type factual circumstance is clearly correct.

Amalgamated's Constitution contemplates that, in the typical case, a member who is aggrieved by a local union's action or inaction should appeal, first, to that local union, itself, then to the joint board, and, finally, to Amalgamated. However, that constitution also permits a direct appeal to Amalgamated's General Executive Board without exhausting the intermediate steps.

While Petitioners' complaint alleged "collusion" between

Zohn, Local 263 and the Joint Board, the real basis for Petitioners' justification for their refusal to appeal, either to Local 263 or to the Joint Board, respecting this matter was their claim that the representatives of these two bodies would be disqualified from passing upon Petitioners' claims because of their "prior knowledge" of the matter.

At the same time, however, there was no allegation of any nature that any representative of Amalgamated was guilty of any active wrongdoing against Petitioners; the only claim asserted against Amalgamated, itself, was based upon the theory that Amalgamated was liable to Petitioners for the actions of representatives of Local 263 and of the Joint Board, under the doctrine of respondent superior. Indeed, Petitioners conceded that no "employee or officer of Amalgamated as such had anything to do with the events" upon which the allegations of the complaint were based.

Given this undisputed factual framework, the Court of Appeals concluded that Petitioners had failed to show any justification for their failure to allow Amalgamated's General Executive Board to pass upon their claims of wrongdoing by representatives of its local affiliates (and to require corrective action to be taken, if found warranted by the circumstances) before instituting legal action against the three organizations.

It is respectfully submitted that the lower court's conclusion in this regard is in full accord with the decisions of the other circuits upon similar issues and is in nowise inconsistent with the principles announced by this Court in either *Glover* or *Shipbuilding Workers, Local 22*.

Under these circumstances, there is no valid basis for the grant by this Court of its writ of certiorari.

CONCLUSION

The Petitioners having failed to show any justification for a departure in this case from the generally recognized rule that a member of a labor organization must exhaust the remedies provided to him by that organization's constitution before resorting to the courts, it is respectfully submitted that their Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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